

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA K. WINEGARNER

Claimant

VS.

SEDGWICK COUNTY

Self-Insured Respondent

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Docket No. 1,018,925

ORDER

Respondent requests review of the October 13, 2004 preliminary hearing Order entered by Special Administrative Law Judge Marvin Appling.

ISSUES

Claimant requested that respondent provide ongoing medical treatment along with a change of treating physician. The Special Administrative Law Judge (SALJ) granted claimant's request and designated Dr. George Fluter as the treating physician. In addition, the SALJ granted claimant's request for temporary total disability benefits provided Dr. Fluter found she is unable to engage in any substantial and gainful employment, or is otherwise taken off work.

The respondent requests review of whether the SALJ exceeded his authority and jurisdiction in granting claimant's request that Dr. Fluter be designated the treating physician. Respondent contends the Order of October 13, 2004 completely disregards the explicit statutory language of K.S.A. 44-510h(b)(1) and allows claimant to effectively pick her own authorized treating physician rather than allowing respondent to provide a list of three health care providers as contemplated by the statute.

Claimant argues that there is no jurisdictional issue present in this appeal and as such, the respondent's appeal should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

It is uncontroverted that claimant sustained a compensable injury while in respondent's employ. She has had medical benefits provided to her which include

authorized treatment with Dr. Mark Melhorn and Dr. John Estivo. As of June 25, 2004, both Drs. Melhorn and Estivo concluded claimant was at maximum medical improvement and no longer in need of treatment. Claimant then retained an attorney and was evaluated by Dr. Flutter on September 21, 2004. Dr. Flutter concluded claimant would benefit from additional treatment and testing.

Claimant, through her attorney, requested a change of physician and forwarded Dr. Flutter's report to respondent and its counsel. When no new change of physician was offered, a preliminary hearing was scheduled. Although respondent was willing to refer claimant back to Dr. Estivo for further treatment, that was unacceptable to claimant. Even the SALJ noted the futility of that suggestion as it was unclear if Dr. Estivo would actually treat claimant when he had already concluded she was at maximum medical improvement.¹ Respondent then offered to provide a list of 3 physicians consistent with the provisions of K.S.A. 44-51-h(b)(1). That suggestion was equally unacceptable as it was viewed as "too little, too late".²

The SALJ granted each of claimant's request, appointing Dr. Flutter as the treating physician. It is this aspect of the SALJ's Order that respondent takes issue. Respondent maintains the decision to designate Dr. Flutter, the physician claimant chose, exceeds the SALJ's jurisdiction. The Board disagrees.

The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Is there any defense to the compensability of the claim?³

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.⁴ Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly but

¹ P.H. Trans. at 11.

² *Id.* at 8.

³ K.S.A. 44-534a(a)(2).

⁴ K.S.A. 44-551(b)(2)(A).

includes the power to decide it wrongly. The test of jurisdiction is not a correct decision but the right to enter upon inquiry and make a decision.⁵

The Board has on other occasions determined that a request to change the authorized treating physician is the furnishing of medical treatment. The preliminary hearing statute found at K.S.A. 44-534a gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. Thus, the SALJ did not exceed his jurisdiction and the Board does not have jurisdiction to review the Judge's preliminary Order.

While respondent may be aggrieved by the SALJ's selection of the physician utilized by claimant, there was ample opportunity for respondent to provide a list of 3 physicians in advance of the preliminary hearing, thereby avoiding the necessity and uncertainty associated with a hearing.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.⁶

WHEREFORE, it is the finding, decision and order of the Board that the respondent's appeal of the preliminary hearing Order of Special Administrative Law Judge Marvin Appling dated October 13, 2004, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Robert G. Martin and Gary K. Albin, Attorneys for Self-Insured Respondent
Marvin Appling, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁵ *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683, P.2d 902 (1984).

⁶ K.S.A. 44-534a(a)(2).